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In the Supreme Court of the United States

October Term, 1984

HENRY PARK for
UNITED WORLD ENTERPRISES, INC.,

Petitioner,

vs.

METRO-GOLDWYN-MAYER/
UNITED ARTISTS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI— CONFLICT OF LAW

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JURISDICTION

The Opinion of the United States Court of Appeals for the Ninth Circuit was entered on June 14, 1984. A Petition for Rehearing was denied on September 26, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

WHETHER REFUSAL BY THE ORIGINAL AND REVIEWING COURTS TO DECIDE THE VALIDITY OF A GENERAL RELEASE UNDER THE LAW OF A SISTER STATE WHICH WAS DICTATED BY ONE TERM OF SUCH RELEASE, NAMELY A CHOICE OF LAW CLAUSE — SPECIFICALLY PLEADED BY DEFENSE — WHERE THE DISTRICT COURT HELD THAT THE RELEASE BARRED THE ANTI-TRUST CLAIM OF YOUR PETITIONER (WHICH HOLDING WAS AFFIRMED BY THE COURT OF APPEALS) IS A DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW AND IS REPUGNANT TO THE HERETOFORE-HELD CONSTITUTIONAL STANDARDS.

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PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The Opinion of the Court of Appeals for the Ninth Circuit (Appendix A, infra, pp A-1 to A-10) is in Memorandum and was not published. The Opinion of the District Court for the Central District of California GRANTING Motion to Dismiss; DENYING Motion for Reconsideration; and DISMISSING Action With Prejudice are attached as Appendices.

CONTRACTURAL PROVISIONS INVOLVED

The pertinent provisions of the contract and release herein involved are cited in pertinent part in this brief.

STATEMENT

1. **Background:**

On January 10, 1980 Petitioner (hereinafter PARK) entered into contract with Respondent (hereinafter UA) for purchase of a motion picture film from UA entitled ROCKY II.

Prior oral negotiations led to such sale of this film contingent on Park's also purchasing three (3) other films of UA's in order to get Rocky II. Park paid the sum of $380,000 for Rocky II and $435,000 (less $90,000 which was never paid) for the other three films.

ROCKY II played South Korea and lost money. Prior to delivery of the film, UA on May 5, 1980, informed Park that he *had* to send a letter absolving UA contractually if any films were censored by South Korea. Park executed this unusual request (since the contract already had a censorship clause) and UA released the films.

Park submitted the film "CUBA" which was censored by South Korea and UA substituted the film "ROLLERBALL," which was also censored by reason of its subject matter and content. Park demanded films from UA which would "play" in South Korea and a period of many months ensued in which Park and his "agents" and UA and their various employees tried to resolve the issue of proper film lists for viewing in South Korea. At this point in time, UA held $335,000 of Park's money and Park still had not shown any film (other than Rocky II—which is not in dispute) in South Korea or had been given any film in a better category.

The negotiations resulted in a release executed on January 22, 1982—a little over 2 years from the date of the original contract—UA extracted the release by telling Park to "take $100,000 and no films or take nothing at all!" Park took the $100,000 of his own money and UA retained $235,000 of Park's money paid to UA for the licensing of films which could not be shown in South Korea and which would not be

upgraded by UA. This action resulted therefrom.

2. **History of the Case:**

Park filed his action on November 9, 1982, alleging violations of the anti-trust laws of the United States, asking treble damages for, inter alia, vertical restraint of trade, monopolization, and unlawful tying of products. On February 8, 1983, UA moved, pursuant to FRCP 12(b)(6) to dismiss for failure to state a claim and asserting the release as a bar to the action.

Oral argument was held before the District Court, Lucas, J., and on April 22, 1983 the District Court granted UA's motion to dismiss because the general release barred the action. Park was given 10 days to amend the Complaint.

Electing to file a Motion for Reconsideration instead of amending, Park did just that on May 6, 1983 on which day the Court also filed a judgment dismissing the case with prejudice. The court accepted the motion for consideration and on June 24, 1983—after considering the parties' arguments—denied the motion for reconsideration.

On July 22, 1983, Park filed a notice of APPEAL. Oral argument was heard and on June 14, 1984 the Ninth Circuit Court of Appeals affirmed the District Court's Order whereupon Park filed a Petition for Rehearing based upon the premise that the district court as well as the circuit court failed to apply the proper—i.e. New York—law to the release. The circuit court denied the rehearing petition, and this Petition for Certiorari results.

REASONS FOR GRANTING THE WRIT

In this case, both the District Court and the Court of Appeals ruled that a release signed by Park barred an anti-trust claim, by the terms of said release.

These rulings are contrary to *stare decisis* of the below district and circuit and upsets the well settled practice upon which parties to a contract may or may not contract and dictate whatever terms suit their purposes so long as those terms and their purpose are not illegal or contravene public policy or violate the constitution.

The said rulings are erroneous and will have a far-reaching

effect upon parties—in good faith—to a release if such rulings are left standing.

The thrust of Park's argument is thusly stated:

1. The district court erroneously barred an anti-trust claim based upon a release executed by Park;

2. The district court failed to apply the choice of law to the substantive nature of the said release;

3. The district court never indicated in its opinion what law it used to interpret the release;

4. The court of appeals affirmed the decision of the district court and thereby itself failed to honor or to enforce the choice of law (forum) clause of the release;

5. The court of appeals failed to apply California law regarding choice of law clauses; and

6. The court of appeals failed to accept Park's petition for rehearing on the issue of the law applied by said court of appeals in affirming the district court's judgment, where said affirmation is devoid of any California or New York law.

DISCUSSION

A. THE RELEASE MUST BE INTERPRETED UNDER THAT STANDARD WHICH PREVAILS UNDER NEW YORK LAW—THE CHOICE OF LAW

A release is a contractural relation. *Aetna Casualty and Surety Co. v. Jackowe*, 468 NYS 2d 153, 96 A 2d 37 (NYAD 2 Dept 1983); *Mt. Read Terminal, Inc. v. Le Chase Const. Corp.*, 396 NYS 2d 959, 58 A 2d 1034 (NYAD 1977) and it will be governed by contract law.

Therefore, for a release to be valid and binding, certain prerequisites are necessary; i.e., that the intent of the parties is mutual, that there be no fraud, or duress, and that there be consideration.

The mutuality of the parties often manifests itself in the terms or stipulations of a contract or release, and one such term or stipulation is the inclusion of a "choice-of-law" clause (hereinafter forum clause).

This choice-of-law clause dictates what law the parties want to govern any disput which may arise out of their

dealings. On the other hand, a forum clause, per se, will indicate what forum or court or jurisdiction the parties intend that any action be filed.

We are not concerned with a *choice of forum*, in this action but we are concerned with the choice-of-law clause in the release executed by Park, but for the sake of expediency the phrase "forum clause" is used herein.

In addition to the prerequisites mentioned above, there must also be a substantial relation of the parties or the contract/release to the law of the clause at issue. There must also be a clear intent of the parties recognizable as such. A perusal of the January 10, 1980 agreement reveals as paragraph 16 that:

> "It is agreed by and between the parties hereto that all questions arising hereunder shall be interpreted by the laws of the State of New York of the United States of America."

In considering the rules laid down for the selection of the proper law to govern contractural rights, where questions of conflict of law are presented, it should be recognized that such rules have been created in an effort to carry out the presumed intention of the parties. *8 NY Jur, Conflict of Laws*, §§16-19; *A.S. Rampell, Inc. v. Hyster Co.*, 3 NY 2d 369, 165 NYS 2d 475, 144 NE 2d 371.

The general rules as to what law governs a contract are subordinate to the primary canon of construction which requires that where it can be ascertained the intention of the parties shall govern, *Rampell, supra*, and parties are permitted to stipulate what law shall be applied in determining its validity and interpretation at least where that law has some reasonable connection with the issues to be determined and such provision will be given effect. *El Hoss Engineering & Transport Co. v. American Independent Oil Co.*, 183 F Supp 294, (SDNY 1960), revd on other grounds (CA2 1961 289 F.2d 346, cert denied 368 US 837, 7 L Ed 2d 38, 82 SCt 51.

The parties may, under this principle, readily adopt any law as that of the contract; and if the adoption is bonafide and devoid of fraud or duress, the entire transaction will be governed by such law in accordance with the intent of the parties, regardless of where the contract is actually made. As

stated, supra, the parties herein adopted the laws of the State of New York as controlling in any dispute.

This was not idle designation, for New York has substantial connections with the release/contract; e.g.:

a) the agreement was made in New York;
b) the films were to be paid for in New York;
c) the corporate offices of UA were in New York;
d) the negotiations for the release primarily took place in New York;
e) the consideration issued out of New York.

Thus, it is satisfactorily established that the choice of law stipulated by the parties to control had substantial connection with the issues to be determined, and such provision will be given effect. *El Hoss, supra.* This is also the law in California. See *Consolidated Date Terminals v. Applied Digital Data*, 512 F Supp 581 (NDCAL 1981).

The parties may, under this principle, readily adopt any law as that of the contract—which the parties herein did—and if that adoption is bonafide and devoid of fraud AND duress—which Park disputes—the entire transaction will be governed by such law—which it never was—in accordance with the intent of the parties—New York law was not used—regardless of where the contract was actually made. *Rampell*, supra.

It follows then that in the absence of public policy considerations, contractural provisions which indicate the jurisdiction whose law is applicable to the contract are enforced. *Telco Leasing, Inc. v. Transwestern Title Co.*, 630 F.2d 691 (CA9 1980), *A Empressa, etc. v. Boeing Co.*, 641 F.2d 741 (CA 9 1980).

Telco was a matter of the application of law to attorneys fees and the use of California versus Illinois (forum choice) law. The district court decided the issue using California law and the circuit court, Kelleher, J., said:

> "The lease agreement expressly provided that the law of Illinois would apply in any action brought to enforce the lease. In this regard, the district court correctly applied Illinois law to the effect that the failure of the appellant to perform a material contractural obligation precludes

it from recovery (citations omitted). Further, because the contract is clear on its face, the appellant cannot rely on extrinsic evidence to vary the terms of the agreement (citations omitted)."

It obviously follows then that the law of the circuit is that an agreement obvious on its face will be enforced. This is a substantive issue and as such will have the choice of law applied in conformity with the intent of the parties. The instant release was to be governed under New York law because it, too, is clear upon its face, in the agreement of January 10, 1980, at paragraph 16.

However, procedural matters will be interpreted under the lex loci and to the issue of the law to be applied to matter of the attorney fee dispute, the Telco court said:

"We believe that in applying the law of California, rather than Illinois, the District court committed plain error, and the judgment awarding attorney's fees should be reversed.

Paragraph 16[1] of the lease agreement specifically provided for the application of Illinois law in a dispute concerning the agreement. In the absence of public policy considerations, which do not appear to be present here, such contractural provisions are enforced. *Lauritzen v. Larsen*, 345 US 571, 588-589, 73 S Ct 921, 931-932, 97 LEd 1254 (1953)."

630 F.2d at 693.

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[1]Curiously, the paragraph 16 referred to in the Telco lease agreement is identical to the paragraph 16 of the instant film licensing agreement because the agreements used was the standard, boiler-plate "Jules Blumberg form"—with Illinois substituted for New York, of course.

The California view is that in the absence of compelling grounds of policy to the contrary, the primary test for the determination of the proper law of a contract is the object and intent of the parties and all appropriate sections of the Civil Code should be given application in determining the parties' intention as to the proper law governing the contract. *Eaton v. Theime*, 15 CA 2d 458, 59 P 2d 638. See 12 Cal Jur 3d §75, Conflict of Laws 565-566 and that the parties may expressly agree on what law shall govern the contract. *Palmer v. Atchison, T. & S.F. RR Co.*, 101 C 187, 35 P 630.

This is exactly what the parties herein did; in paragraph 16 of the licensing agreement they exressly agreed that the law of the State of New York would govern disputes.

The district court—as well as the Circuit Court—failed or refused to honor and enforce this express provision, and such refusal and failure was plain error. *Telco, supra*, see also *Sarlott-Kantarjian v. First Pa. Mortgage Trust*, 599 F.2d 915 (CA 9 1979), where the court stated:

> "(1-2) California choice of law rules properly govern the question of whether the contractural choice-of-law clause is valid, for it is well established that the conflict of law rules to be applied by a federal court...must conform to those prevailing in the state in which the federal court is located (citations omitted)."
>
> "Under California law, contractural choice of law provision will be respected unless the transaction falls into either of two exceptions outlined by the Restatement 2d, Conflict of Laws, Section 187,...neither of which applies in this case."
>
> *599 F.2d at 917.*

There can be no doubt, then, that the purpose underlying the contractural provision here at issue seems clear. The clause in the January 10, 1980 agreement determining the choice of law to be applied to disputes was inserted by UA and agreed by Park in order to assure that any litigation under the agreement and release should be conducted under the laws of the State of New York.

The agreement specifically provided that "it is agreed by

and between the parties hereto that all questions arising hereunder shall be interpreted and governed under and by the laws of the State of New York of the United States of America."

And, it is well settled, as the courts below recognized in *Consolidated Data Terminals, supra*, and *Sarlott-Kantjarjian, supra*, that parties to a contract may agree in advance to the jurisdiction or choice of law of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether. See e.g., *Kenney Construction Co. v. Allen*, 101 USAPP DC 334, 248 F.2d 617 (CA2 1948); *Gilbert v. Burnstine*, 255 NY 348, 174 NE 706, 75 ALR 1453 (1931); *National Equipment Rental, Ltd. v. Szukhent*, 375 US 311, 84 S Ct 411 (1964).

This Court has repeatedly ruled on this issue and set the standard which was violated by the courts below. Not only has the courts below ruled contrary to stare decisis of this Court—they have gone against stare decisis of their own circuit. See *Twentieth Century Fox Film Corp. v. Winchester Drive-In Theatres*, 351 F.2d 925 (CA 9 1965) and the circuit precedents in *Telco, Consolidated*, etc.

The record below reveals a patent disregard for established law, both statutory and case. The California Civil Code provides, as a general rule governing the construction of contracts, that a contract must receive such an interpretation as to make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.

Thus, the rules of interpretation—that the parties must have intended to enter into an enforceable legal transaction and that such choice of law should be made which will validate the agreement, providing it has substantial connection with the transaction—will control the choice of law between competing jurisdictions. See, e.g. *Robbins v. Pacific Eastern Corp.*, 8 C2d 241, 65 P 2d 42 (contract for exchange of stock, invalid under California law, upheld under New York law); *Danton v. Haas*, 52 CA 87, 198 P 818 (place of performance New York or uncertain; law of place of contract —NY—applied); *Sullivan v. Shannon*, 25 CA 2d 422, 71 P 2d 498 (where bond was executed and payable in New York, auto accelerating clause in case of default was held self-

executing under New York law for purposes of applying the California Statute of Limitations); *Gash v. Hamer*, 55 CA 50, 202 P 917 (contract made and to be performed in New York construed according to usages of that state); see also *12 Cal Jur 3d, Conflict of Laws* §§69-76; *8 NY Jur, Conflict of Laws*, §§20, 21; *McKinney's Consolidated Laws of New York, General Obligations*, C 23A §§5-1103, n 3, 4, 15-101 et seq; *Deering's California Code*, §§1542, 1546, 1857. The statutory law cited above was totally disregarded by the courts below in favor of rulings inconsistent with the concept of due process of law.

B. WHAT LAW APPLIES—STATE OR FEDERAL?

The agreement herein states that the laws of the State of New York will govern the agreement, and—as UA affirmatively defends—the release as well. However, this court, as well as inferior courts, have adopted the rule that where a federally protected right is affected by a release, the release will be interpreted under federal law. *Scott Paper Co. v. Maracalus Mfg. Co.*, 326 US 246, 255-256, 66 SCt 101, 90 L Ed 47 (1945).

Federal law has been held to govern the effect of a release of a claim of a railroad worker under the FELA in *Dice v. Akron, C&Y RR*, 342 US 359, 72 SCt 312, 96 LEd 398 (1952); also of a claim based upon the Securities Exchange Act, *Stella v. Kaiser*, 221 F.2d 115 (CA 2), cert denied 350 US 835, 76 SCt 71, 100 LEd 745 (1955); and of a claim for treble damages under the anti-trust laws, *Twentieth Century Fox Film Corp. v. Winchester Drive-In Theatres, supra.* Accord, *Taxin v. Food Fair Stores*, 197 F Supp 827, 832-833 (EDRa 1961); *Dale Hilton, Inc. v. Triangle Publications, Inc.*, 198 F Supp 638 (SDNY 1961).

This Court recently upheld the application of federal law with respect to the effect of a release of a federally protected patent claim in *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 US 476, 501, 84 SCt 1526, 12 LEd 2d 457 (1964), as well as other claims in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 US 349, 91 SCt 795 (1971)

There can be no doubt that the instant release was to be interpreted under federal law since the federally protected right of anti-trust is in issue; but, just what federal laws are to be enforced.

Petitioner Park submits that in the absence of 9th Circuit law which reflects the standard of New York, that the law of the federal courts of the district and circuit of New York—which would certainly reflect the New York standard as to releases—should and must have been applied. They were not!

A perusal of the District Court's ORDER GRANTING DEFENDANTS' MOTION TO DISMISS (App B-3) will reveal that the district court finds that the executed release bars the anti-trust claim. The law which the court uses to support this holding is *Carter v. Twentieth Century Film Corp.*, 127 F Supp 675 (W.D. Mo. 1955) by which the court attempts to put Park's argument into a limited exception of the general release rule.

This Carter case is not only NOT applicable, it isn't even in concert with the holdings of the federal courts in New York. If the California District Court can find no law to support its position, then it must first look to New York law and then around to sister districts. The standard to be applied to the substantive aspect of the release is not law of the Western District of Missouri, but that law of the State of New York.

What the district court did—and the circuit court followed suit—was to amount to "law shopping." It is well settled that forum shopping and judge shopping is not to be tolerated; so why should the courts below be allowed to "law shop"?! There is ample case law in the New York courts to determine the issues before the courts below; however, there seems to be a dearth of law to support an erroneous finding.

Moreover, the court did not base its holding on any body of law, nor did it give any legal reason for finding that the release barred the anti-trust claim, and except for the Carter reference, the Opinion is devoid of anything with which to satisfy the Federal Rules of Civil Procedure as to written opinions and the underlying reasons and law therefor. Judge Lucas gave no legal reasons, he cited no applicable law—state or federal—he completely ignored the standards of New

York and California, and, except for his finding that the release barred the action, the opinion amounted to mere dictum.

This failure to apply a standard issue was addressed in *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324 (CA 9 1981) where the Court said:

> "The contract stated that it was to be construed under the laws of Pennsylvania, *but the district court did not indicate whether it reached its conclusions on the basis of Califdornia or Pennsylvania law.*
>
> We vacate and reverse the court's entry [of Summary Judgment] against Hollingsworth [on the unfair competition claim]." (emphasis added)
>
> *622 F.2d at 1338*

Just on the basis of the circuit court's holding in Hollingsworth alone, it was bound to reverse the district court's inadequate ruling and demand for a hearing on the validity, vel non, of the release under the laws of the State of New York, unless, of course, stare decisis is suspended at whim by the Ninth Circuit Court of Appeals.

The question then arises as to why the Ninth Circuit would apply the spirit and letter of the law as regards *Hollingsworth* and *Telco, supra*, but refuse or fail to apply not only the letter of the law, but the spirit of the law for Park.

Does the answer to that question lie in the fact that Park is a native Korean private citizen daring to oppose a major motion picture company in the very heart of film country—Los Angeles?

Or is the answer simply that the circuit court "rubber stamped" the district courts finding.

Whatever the answer is, the result is clear. *Hollingsworth, Telco, Sarlott-Kantarjian,* etc., had the distinction and privilege of constitutional protection. Park had no such "equal protection of the law." *Hollingsworth, Telco, Sarlott-Kantarjian*, etc. enjoyed that fundamental guaranty of due process of law—a right denied to Park.

Since this Court mandated that federal law will apply to cases involving a federally protected right, *Dice, Aro,* etc., *supra*, it follows that the Ninth Circuit was bound to follow

that mandate. This the circuit court did not do. In fact, it failed to even meet the issue of whether the choice of law was valid under California or New York law.

The record is silent as to any standard of the validity of the substantiveness of the release being used by the circuit court. The court does not indicate if New York law conflicts with California law on this point. In point of fact there is no indication at all in the record that the release's substantiveness was ever considered.

Neither court below indicated whether or not New York conflicts with California law necessitating that California and New York have significant interests in having their law applied. See *Strassberg v. New England Mutual*, 575 F.2d 1262, 1263-1264 (CA 9 1978); *Offshore Rental v. Continental Oil Co.*, 22 Cal 3d 157, 163, 148 Cal Rptr 867, 870-871, 583 P2d 721 (1978), where the Court said:

> "Where significant interests conflict, the Court must assess the "comparative impairment" of each state's policies."
>
> *Strassberg*, at 1264, *Off Shore*, 22 Cal 3d at 164-165, 148 Cal Rptr at 872-873, 583 P 2d at 726-727.

The law applied will be that of the state whose policies would suffer the most were a different state's law applied. *Strassberg* at 1264. Also, a separate choice of law inquiry must be made with respect to each issue in a case. *Beach Aircraft Corp. v. Superior Court of Los Angeles*, 61 Cal App 3d 501, 518, 132 Cal Rptr 541, 550 (1976).

This significant interest rule of *Strassberg* does not come into play herein, even though the rule would be satisfied by the relationship of New York to the matters of the agreement and release if it were considered. The forum clause effectively ensures that the laws of New York would control. However, this seems not to be the case herein.

The rules of *Strassberg* and *Beach* apply regardless of whether the dispute arises out of contract or tort. *Strassberg, supra* at 1264. An exception applies, however, in the case of contracts with a choice of law provision. California would apply the substantive law designated by the contract unless the transaction falls into either of two exceptions.

1) the chosen state has no substantial relationship to the parties or to the transaction, or
2) application of the law of the chosen state would be contrary to a fundamental policy of the state.

Sarlot-Kantarjian, supra, 599 F.2d at 915. See *Gamer v. duPoint Walston, Inc.*, 65 Cal App 3d 280, 286, 135 Cal Rptr 347, 352 n.6 (1972). *A. Empressa, etc. v. Boeing, supra.*

The record herein is clear, and there is no conflict. California upholds the choice of law clause pursuant to Civil Code §1646 (Deering's California Codes). In addition, New York has substantial ties to the parties or to the transaction as was indicated, supra, and California law would not suffer by using the New York standard; lastly, public policy in California would not be contravened by using the law of the "choice of law" clause.

The Circuit court ignored the substantive law of the choice of law state—New York—and failed to follow its own circuit—as well as this Court's—prior holdings.

A review of the record below will show that UA pleaded the release as a bar to the action. Since defenses are generally regarded as substantive in nature and are governed by the proper law of the transaction rather than the lex loci—in this case, New York, as also stipulated in the agreement—the district court was bound to decide the substantive issue of the release according to New York standards. To this end Park, in his Motion for Reconsideration, relied on *Michael Rose Productions, Inc. v. Leow's, Inc.*, 141 F Supp 257 (SDNY 1956) as the controlling case in this area and on almost all fours with the instant case. The district court—as well as the Circuit Court—did not recognize or follow this still good New York law, but chose, instead, to make their rulings outside *stare decisis* and fundamental fairness.

The substantive nature of the release had to be decided according to New York law.

The courts failed to do this; and, even if the courts below had interpreted the release according to the California standard—which they did not do and the record is devoid of any standard being used—the result would have been the same as using New York standards because New York and California are not in conflict on the issue of releases but are,

in fact, compatible...the release was void, or voidable, as a matter of law and not a bar to the action because Park never intended to relinquish a right which he did not know existed at the time of the execution of the release which would have materially affected his bargaining position and outcome of the terms of the release.

It is well established that a party may contract away unknown claims if that is his intent; however, if it is not a party's intention to give up by release any claim which is unknown to him or not contemplated by him at the time of the execution of a release, these unknown claims are not waived, but are reserved. See *NY Jur 3d Compromise, Settlement & Release*, §103. Accord Deering's California Code §1542 which states that: "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor." Park did not know of anti-trust claims and therefore could not have released them knowingly and intelligently.

Nowhere does the record reveal interpretation or construction of the release in question. Nowhere do the courts below attempt to determine the intent of the parties to the release. It has been held that the interpretation and construction of the release was a question for a jury to determine if "matters embraced by the release provision include only those things which were clearly and specifically set forth and can be ascertained from a reading of the account." *Public Service Co. of Colorado v. Chase Manhattan Bank*, N.A., 577 F Supp 92 (DCNY 1983).

What matters are clearly and specifically set forth can be ascertained by a reading of the instant release agreement where we find that for the consideration of One Hundred Thousand Dollars ($100,000) lawful money of the United States of America, Park will not litigate against UA "out of or in connection with that certain agreement dated January 10, 1980...for the licensing of certain motion pictures for theatrical exhibition in South Korea or any other contracts, agreements, understandings, or courses of dealing between...Park on the one hand and United (UA) on the other hand."

This release so much like all the other standard "Jules Blumberg" form releases, cannot release claims which were not within the contemplation of the parties at the time of the release, its general language notwithstanding, and UA has not come forth with evidence or affidavit to prove that anti-trust claims were intended to be released, since once a release is pleaded as a defense the party asserting the release must bear the burden of coming forth to prove that the release of claims was in the contemplation of the parties and that such release of future claims was knowingly and intelligently waived. See *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 US 292, 307, 81 LEd 1093, 1103, 57 SCt 724 (1937) where the Court said in the civil area, "[w]e do not presume acquiescence in the loss of fundamental rights." cited in D. H. Overmyer Co. v. Frick Co., 405 US 174, 186, 92 SCt 775, 31 L Ed 2d 134 (distinguishing, for due process purposes, between contracts signed by sophisticated corporate parties and those in which individuals have "unequal bargaining power" or may be subject to "overreaching").

The courts below chose to truncate the release and the agreement of which it is a part; they chose to use those parts which support their position and ignore those parts (choice of law clause) which did not suit their purposes. This is error. A court cannot select parts of a contract to support its findings and ignore the other terms of it because they are either embarrassing or not in keeping with a predisposition.

In *Vines v. General Outdoor Advertising Co.*, (2 Cir. 1948) 171 F.2d 487, a salesman of outdoor advertising sued his former employer for compensation for services rendered by him. His contract provided that he would be paid by commission and that any accounts assigned to him for solicitation could be withdrawn by his employer at any time prior to an actual sale. His right to compensation on any withdrawn account would cease. In his suit, the salesman claimed that a withdrawal of one of his accounts was in violation of the anti-trust laws, in that his employer contracted with Outdoor Advertising Company the defendant therein.

Plaintiff Vines also alleged that he did not know of these facts until after his suit for compensation had been instituted. He claimed damages under the anti-trust laws. Defendants

pleaded a written release of "all claims and demands of any kind whatsoever to the date hereof, and particularly *** any claims or demands for salary, commission or other compensation under any employment or contract of employment." *** The District Court dismissed the complaint but Judge Learned Hand of the Second Circuit reversed this order saying:

> "***that ignorance [of a contract between defendant and a third party] might not alone be enough to avoid the release, had it contained the general words. Moreover, the fact that words of general import were followed by words of particular instances, did not inexorably leave no scope to the words of general import. In releases, as elsewhere, the intent of the parties is to be gathered from the instrument as a whole. Nevertheless, the courts of New York accept the common law doctrine that in a release words of general import, followed or preceded by words relating to specific claims, are, ceteris parabis, limited to the specific claims. For the present, we need say no more than that *the release* of April 8th, 1941, *did not inevitably release claims which the plaintiff might have had under the Anti-Trust Acts, of which he was ignorant at the time.* (footnotes eliminated) *171 F.2d at 492* (emphasis added)

Further, in another New York case decided in the Southern District, i.e. *Walder v. Paramount Publix Corp.*, (SDNY 1955) 132 F Supp 912, the former owners of a movie theater sued a distributor under the anti-trust laws. The distributor asserted a release as a defense. The court held that the release legally insufficient to support summary judgment for the distributor. The essential terms of the release and the Court's holding appears as follows, in pertinent part:

> "There are general clauses in the release sufficiently broad to bar the plaintiff's present claims. However, the first 'whereas' clause suggests a narrower scope. It states that the parties have had dealings and transactions relating to the 'Tivoli Theatre and its equipment' and that disputes have arisen 'with reference thereto and otherwise.' The defendants, in addition to the general

clauses rely on the words 'and otherwise,' but the 'whereas' clause read as a whole appears to imply a more limited scope than that for which they contend. *Whether the release was limited* to the claims relating to the equipment and repairs *or was sufficiently broad* to encompass all claims arising out of the operation of the theatre including anti-trust violations *is not altogether clear from the face of the document. In view of this ambiguity the intention of the parties becomes relevant. Thus a substantial issue of fact exists which requires the denial of the motion for summary judgment.* (footnotes eliminated)."

132 F Supp at 916-917 (emphasis added). Also see Clarke Baridon, Inc. v. Merritt-Chapman & Scott Corp., (4th Cir, 1962) 311 F.2d 389, 394; *Starline Limited v. Puerto Rico Maritime Ship. Auth.* (SDNY 1978) 451 F Supp 157.

In the case at bar the parties contracted with reference to the laws of the State of New York applicable to contracts. State law and Federal policy are complimentary. Two policies are promoted. First, the federal policy of respect for private anti-trust claimants is the hallmark of the anti-trust regulatory system. The second policy requires respect for the amicable settlement and release of anti-trust claims so long as the parties so intend. A right conferred on a private party by federal statute and granted in the public interest to effectuate legislative policy, may not be released if the legislative policy would be contravened. New York state law is limited to federal policy.

Here, policy favors private enforcement of the anti-trust laws. In the instant case, policy and law supports permitting a hearing to consider extrinsic evidence and to construe the release narrowly under *stare decisis*. In *Novak v. General Electric Corp.*, 282 F Supp 1010, Judge Higginbothom most persuasively said:

"While the federal policy of jealously guarding the rights of private anti-trust claimants should not as a matter of law preclude their being able to release claims—even unknown claims—nor protect them, after-the-fact,

> from their conscious though unwise action, we think it does allow—and is supported by—a rule which requires the court to determine that they *knew and intended* that the release cover all it is being held to cover. The question of the parties' intent as to the scope of the release is one of fact and not readily ascertained on a motion for summary judgment; but should be determined by the trier of fact after a full hearing (emphasis in original)."
>
> *282 F Supp at 1023.*

Vines and *Walder, supra*, give added support to *Novak, ibid*, because in each of those cases, the court looked behind the broad language of the release to hold that an anti-trust claim was not released or barred as a matter of law. The instant case is entitled to no less than that which is the law of the courts of the district of which the State of New York is a part, and whose law controls the language of the agreement and the release.

C. REFUSAL OF THE COURTS BELOW TO HONOR AND ENFORCE THE CHOICE OF LAW CLAUSE WORKED A DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS AGAINST PETITIONER

The Constitution is clear. A person may not be deprived of property except by due process of law. Accordingly citizens are also guaranteed the equal protection of the laws. US Const. Amendment 14, cl 2.

How then was Park deprived of these fundamental rights?!

The record below reveals that Park executed a release of claims against UA, and in consideration for such release UA agreed to return to Park $100,000 of his own money out of a total of $335,000 of Park's money that was then in UA's coffers.

As stated above, the release was subsequent to an agreement which stipulated New York law as dispositive of litigation. New York was never used by the Courts below to dispose of the claim of Park or to determine the validity of

the release's substantiveness.

Park had the right to have the same protection and due process as was received in *Telco Leasing*, and *Sarlot-Kantarjian*, and in *Hollingsworth*, etc., supra. Fundamental fairness and equal protection of the laws dictate that Park have no less than has been given to others litigating a choice of law provision of a general release. This is a constitutional guarantee, and it extends to all citizens, in all cases.

CONCLUSION

This Court should review this case because the undermining of contract rights by improvident court holdings will chill settlements and throw contract law into a frenzy. For these reasons, inter alia, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

RALPH FRANCIS SERVER
LAWRENCE RUBEN BARBA

Attorneys for Petitioner

APPENDIX

FILED

JUN 14 1984

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

APPENDIX "A"

A1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HENRY PARK for UNITED WORLD ENTERPRISES, INC. Plaintiff-Appellant, vs. METRO-GOLDWYN-MAYER/ UNITED ARTISTS ENTERTAINMENT COMPANY, Defendant-Appellee.	No. 83-6080 DC# CV 82-5812 MML MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Malcolm M. Lucas, District Judge, Presiding
Argued and Submitted May 7, 1984

Before: GOODWIN, SNEED, and ALARCON, Circuit Judges.

Henry Park appeals the district court's judgment dismissing his antitrust action against Metro-Goldwyn-Mayer/ United Artists Entertainment Co. (United Artists). We affirm.

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*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

I.

FACTS AND PROCEEDINGS BELOW

In December 1979 appellant Park initiated negotiations with United Artists to purchase the Korean distribution rights to the film "ROCKY II" for $380,000. Before the negotiations were complete, Park contracted with several Korean distributors to show the film during a certain time period. These contracts provided that a timely delivery was essential and thus included $10,000 in liquidated damages for each day the film was late. Park alleges that United Artists found out about the Korean contracts and subsequently conditioned its licensing of "ROCKY II" on the requirement that Park purchase the Korean distribution rights to three other films ("CUBA," JUGGERNAUT," and "MISSOURI BREAKS"). Park therefore claims that he was forced to purchase the whole package for $815,000.

United Artists failed to deliver "ROCKY II" on time, and Park lost a significant amount of money on the licensing agreement. He attempted to recoup some of his investment by distributing "CUBA"; however, this film was rejected by Korean censors. United Artists substituted "ROLLER-BALL" for "CUBA" but it was also rejected. In light of these circumstances Park threatened to sue United Artists unless it provided him with films that were suitable for Korean audiences or, alternatively, returned his money. Park alleges that United Artists offered him $100,000 or "nothing at all" in full settlement for any liability arising out of the licensing agreement. On January 22, 1982, Park, with the aid of an attorney, signed a general release of liability in exchange for $100,000.

On November 22, 1982, Park filed this antitrust suit in federal district court seeking treble damages and injunctive relief for alleged illegal tying by United Artists. United Artists motioned for dismissal of the complaint for failure to state a claim upon which relief could be granted. *See* Fed. R. Civ. P. 12(b)(6). On April 22, 1983, the district court granted United Artists' motion and dismissed the case because the general release signed by Park barred the action. Park was given ten days to file an amended complaint. On May 6, 1983, the

district court entered a final judgment dismissing the case with prejudice because Park had not filed an amended complaint. On the same day, Park filed a Fed. R. Civ. P. 60(b) "Motion for Reconsideration." After considering the parties' arguments, the district court denied the motion on June 24, 1983. On July 22, 1983, Park filed a notice of appeal from the order denying his motion for reconsideration.

II.

ANALYSIS

On appeal, Park challenges the district court's dismissal and its denial of his motion for reconsideration. We first address our power to review the final judgment of dismissal as opposed to the denial of the motion for reconsideration.

A. Power to Review the Judgment of Dismissal

Initially, we must determine whether Park filed his motion for reconsideration under Rule 59 or Rule 60(b) of the Federal Rules of Civil Procedure. If it were filed under Rule 60(b), we could not review the district court's judgment of dismissal. *See Browder v. Director, Department of Corrections,* 434 U.S. 257, 263 n.7 (1978); *Hayward v. Britt*, 572 F.2d 1324, 1325 (9th Cir. 1978). Our review would be limited to the denial of the motion for reconsideration. Our standard in such a review is whether the denial constituted an abuse of discretion.

Park, apparently unaware of these consequences, argues that he filed a Rule 60(b) motion. The motion was written so as to conform to Rule 60(b)(1), (2), (3), (5), and/or (6), and it explicitly states that it was filed under Rule 60(b).

Nonetheless, under the circumstances of this case, a Rule 60(b) motion was inappropriate. A motion under Rule 60(b)(2) would be proper only when "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Because there was no trial in this case, a motion for a new trial was unavailable. A motion under the other subsections of Rule 60(b) would be proper only when the time had expired to move for an alteration of the judgment under Rule 59(e). C. Wright, *The Law of Federal Courts* §98, at 661 (4th

ed. 1983). Under Rule 59(e), "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

In this case Park filed his motion more than ten days after the district court's initial decision which gave him time to amend his complaint. Despite this, the motion would be timely were it treated as a Rule 59(e) motion because it was only after the district court dismissed the case with prejudice on June 24, 1983, that the time could begin to run for purpose of this rule. *Cf. School District No. 5 v. Lundgren*, 259 F.2d 101, 104 (9th Cir. 1958). *See generally* J. Moore & J. Lucas, 7 *Moore's Federal Practice* ¶ 60.20, at 60-170 (2d ed. 1983). Only then was the judgment final. Park filed his motion for reconsideration on the same day; thus, he would clearly have satisfied Rule 59(e)'s ten-day requirement.

The issue is whether we should treat Park's motion as one pursuant to Rule 59(e). In the interests of justice we believe we should do so. Proceeding in this manner, we will review both the district court's underlying judgment and its denial of the motion for reconsideration.

B. District Court's Dismissal for Failure to State a Claim

The issue we confront in reviewing the underlying judgment is whether the general release bars this antitrust action against United Artists. The district court so held and we agree.

In his original complaint Park simply alleged that the release was signed under duress. No facts were provided to support such an allegation. Thus, United Artists filed a motion to dismiss the case for failure to state a claim.[1] In response to this motion Park offered two arguments to avoid the general release. The district court's conclusion that these arguments were insufficient as a matter of law is correct.

First, Park restructured his duress argument. He alleged that the duress was evidenced by the following circumstances:

(a) insistence by defendants [United Artists] that Park appear in person to negotiate;

(b) plaintiff's evidence of numerous air trips to and from New York, in disruption of his life and business, in

order to try to resolve an issue that was instigated by defendant [United Artists];

(c) plaintiff's good faith as evidenced by all the letter evidence.

Plaintiff's Opposition to Defendant's Motion to Dismiss Complaint 5 (Mar. 14, 1983). The alleged acts are insufficient to support a finding of duress. The duress claim otherwise is based solely on conclusory allegations and without supporting affidavits. Thus, the district court properly dismissed the duress allegations. *See Stewart v. Hevelone*, 283 F. Supp. 842, 844-45 (D. Neb. 1968); *McCleneghan v. Union Stock Yards Co.*, 298 F.2d 659, 662-63 (8th Cir. 1962); *Kohen v. H.S. Crocker Co.*, 260 F.2d 790 (5th Cir. 1958).

Second, Park argued that the release was an instrument to further the illegal antitrust behavior. This argument is unavailable under the facts of this case. The release could not be part of the illegal antitrust conduct because it was signed two years after the alleged tying agreement occurred. *Cf. Carter v. Twentieth Century-Fox Film Corp.*, 127 F. Supp. 675 (W.D. Mo. 1955) (release executed at the time antitrust behavior occurred). And Park has made no attempt to show the relationship that the release had with the alleged tying arrangement. *See Dobbins v. Kawasaki Motors Corp.*, 362 F. Supp. 54, 57-58 (D. Or. 1973).

We therefore affirm the district court's initial dismissal of the case that gave Park ten days to amend his complaint. The district court properly concluded that the general release barred a subsequent antitrust claim. *See Ingram Corp. v. J. Ray McDermott & Co., Inc.*, 698 F.2d 1295, 1312-13 (5th Cir. 1983) ("an adequtely drawn and validly executed release will bar antitrust claims"). A Rule 12(b)(6) summary dismissal on the pleadings is entirely proper when an insuperable bar to relief exists. *See* C. Wright & A. Miller, *Federal Practice and Procedure; Civil* § 1357, at 604 (1969). *Cf.* Note, *Conscious Parallelism: The Business Judgment Defense in a Summary Judgment Context*, 35 Hastings L.J. 115, 117-21 (1983) (arguing that "the nature of antitrust litigation encourages summary disposition").

C. District Court's Denial of Park's Motion for Reconsideration

In his motion for reconsideration Park primarily argued that the release was invalid because during the settlement negotiations his lawyer negligently represented his interests. To support these allegations, Park alleged that at that time his attorney was under investigation for a crime and, therefore, wished to phase out his practice. Thus, he argues that the attorney either intentionally or negligently concealed the possibility of an antitrust cause of action against United Artists. Park also argues that he did not know the effect of his release. The district court properly denied the motion.

We first note that Park merely allged; he failed to provide competent evidence to support his factual allegations. No sworn affidavits were submitted to the district court. However, even if Park had provided such evidence, we would be reluctant to set aside the release. *See Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-35 (1962) ("each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney'" [citation omitted]). Park's relief, if any, should lie in a malpractice suit against his attorney. We therefore affirm the district court's denial of the motion for reconsideration.

D. Park's Contentions on Appeal

On appeal, Park raises three additional grounds for reversing the district court's underlying judgment. He argues that (1) the language of the release evidences that both parties did not intend for it to cover the antitrust claims; (2) even if the language releases antitrust claims, a mutual mistake occurred because both parties thought it was a limited release; and (3) his lack of fluency in the English language requires a narrow construction of the release. But these legal arguments were raised for the first time on appeal. They depend upon the allegation of facts that were not presented below. These arguments and allegations appear to be an afterthought, thus we consider them waived. *See Rothman v. Hospital Service of Southern California*, 510 F.2d 956, 960

(9th Cir. 1975). They cannot be raised for the first time on appeal. Litigants have a responsibility to put initially before the trial court the available grounds for relief. To fail to insist upon adherence to this procedure would increase the costs of litigation and impair the efficiency of the judicial system.

AFFIRMED.

FOOTNOTE

[1] Although Park claims that the district court granted a summary judgment under Rules 12(b)(6) and 56, it is clear that the complaint was dismissed for failure to state a claim upon which relief could be granted. Park offered no sworn evidence and the district court decided the case solely on the basis of the complaint. *See Lodge 1380, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC) v. Dennis*, 625 F.2d 819, 824-25 (9th Cir. 1980). Even if we treated the dismissal as one decided under Rule 56, the result would be the same.

FILED
JUN 21 1983
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPU

APPENDIX "B"

A7

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HENRY PARK for UNITED WORLD ENTERPRISES, INC. Plaintiff, vs. METRO-GOLDWYN-MAYER/ UNITED ARTISTS ENTERTAINMENT COMPANY, Defendant.	No. CV-82-5812 MML ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Defendant's motion to dismiss came on for hearing before the Court, the Honorable Malcolm M. Lucas, District Judge presiding, on April 11, 1983. After careful consideration of the papers filed and of the oral argument of counsel, the Court grants defendant's motion and hereby dismisses the complaint in this action.

This case was filed by "Henry Park, *for* United World Enterprises, Inc." on November 9, 1982 (emphasis supplied). The complaint is not entirely clear as to what this is intended to mean. At points the plaintiff is referred to as Henry Park. At other points United World Enterprises, Inc. appears to be the plaintiff. The confusion is aggravated by the fact that the contract underlying this dispute was entered into by still another party, Dong Hyuep Corporation. However, regardless of which of these three parties is involved, the complaint must be dismissed.

The complaint appears to arise solely under the federal antitrust laws although there is reference in the jurisdictional allegations to §5 of the Federal Trade Commission Act (15

U.S.C. §45) (incorrectly referred to by plaintiff as 15 U.S.C. §5). It is clear, however, as defendant correctly argues, that there is no private right of action under the Federal Trade Commission Act. Thus, to the extent plaintiff has attempted to state such a claim, it must be dismissed with prejudice.

Plaintiff's antitrust claims purportedly rest on a license agreement entered into by Dong Hyuep Corp. and defendant on January 10, 1980. Pursuant to this contract Dong Hyuep Corp. purchased the right to show four films in South Korea. Although the allegations of the complaint are not entirely clear, plaintiff apparently alleges that Dong Hyuep Corp. only wished to license one of the films, "Rocky II," but that it was "compelled" or "induced and persuaded" to take the three other films as well. Subsequently, one of the three additional films was censored by the South Korean government. Defendant allegedly then agreed to substitute another film for the censored film. However, this film was also censored. The parties then entered into further negotiations which allegedly resulted in the signing of a release by Henry Park (in his individual capacity, as agent for United World Enterprises, Inc., and as agent for Dong Hyuep Corp.) on January 22, 1982. Under this release, the three parties (Park, United World Enterprises, Inc. and Dong Hyuep Corp.) were to receive a lump sum of $100,000 in return for releasing defendant from any and all claims arising from the January 10, 1980 license agreement.

Plaintiff alleges that defendant's actions constitute violations of the federal antitrust laws. Apparently plaintiff takes the position that defendant

(1) coerced plaintiff into an illegal tying arrangement;
(2) illegally restrained commerce; and
(3) combined and conspired to injure plaintiff "by defendant's monopoly power in the film licensing market through and by the product's uniqueness."

Defendant's motion to dismiss is based on several arguments. Foremost, however, defendant argues that plaintiff's claims, if any, are barred by the release signed on behalf of all three of the parties whose rights are arguably at issue in this litigation. This release was attached as an exhibit to the complaint and may, thus, be considered on the present

motion to dismiss. F.R.Civ.P. 10(c). Plaintiff concedes that as a general rule releases such as this are enforceable and will be held to bar subsequent anti-trust actions. Plaintiff attempts, however, to bring this release within the scope of a narrow exception to this general rule. This exception is described in *Carter v. Twentieth Century Film Corp*, 127 F. Supp. 675 (W.D. Mo. 1955). The Court in *Carter* held that a release is invalid if it is "an instrument used to further the illegal conspiracy or monopoly charged." *Id.*, 127 F. Supp. at 680. Plaintiff in *Carter* alleged that defendants were engaged in a national conspiracy and monopoly to unreasonably restrain interstate trade and commerce. As part of that conspiracy, plaintiff alleged, she had been coerced and compelled to execute a certain contract. One of the defendants moved for summary judgment on the grounds that the contract which plaintiff had executed contained a general release. The Court denied defendant's motion applying the rule set forth above.

Plaintiff in the present action argues in the opposition papers that the January 22, 1982 release, signed two years after the allegedly illegal contract was entered into and, plaintiff concedes, upon the advice of counsel, was part and parcel of defendant's illegal conduct. The Court fails to see any support for this argument either in the facts alleged or in logic. Unlike the situation in *Carter*, the release was not signed "at, or about, the same time" as the alleged illegal activity. There are no allegations which suggest any connection between the execution of the release and any allegedly illegal activity by defendants.

Plaintiff also alleges in a single sentence in the complaint, that the release was signed "under duress." Plaintiff appears to take the position that the release is, thus, void or voidable. However, except for this blanket allegation, there is absolutely no indication in anything before the court that plaintiff can allege in good faith facts to support the contention that the release was signed under duress. As noted above, plaintiff concedes that the release was signed upon the advice of counsel. In opposing the present motion plaintiff stated that the "duress consisted of, but was not limited to, the following:

(a) insistence by defendants [sic] UA that Park appear in person to negotiate;

(b) plaintiff's evidence of numerous air trips to and from New York, in disruption of his life and business, in order to try to resolve an issue that was instigated by defendant UA;

(c) plaintiff's good faith as evidenced by all the letter evidence."

The Court finds, however, that these "facts" would not establish that the release was executed under duress.

The Court notes that plaintiff also argues "in passing" that the release was not enforceable under the "pre-existing duty rule." This argument is without merit.

The Court concludes, therefore, that based on the pleadings presently before the Court, plaintiff's antitrust claims are barred by the January 22, 1982 release. For this reason defendant's motion must be granted.

There are many additional deficiencies in plaintiff's complaint. However, insomuch as it appears highly unlikely that plaintiff will be able to allege facts in good faith sufficient to support an allegation that the January 22, 1982 release is void or voidable, the Court will not address these other problems at this time. Should plaintiff successfully overcome the deficiency discussed in this order the Court will entertain a renewal of defendant's motion to dismiss on the other grounds raised.

The Court hereby dismisses the complaint in this action. Plaintiff may file an amended complaint within ten days. If no amended complaint is filed within this period, the action will be dismissed with prejudice.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

Dated: April 23, 1983

Malcolm M. Lucas
United States District Judge
(original signed)

FILED
MAY 6 1983
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

APPENDIX "C"

A11

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HENRY PARK for UNITED WORLD ENTERPRISES, INC.	)	
Plaintiff,	)	No. CV-82-5812 MML
vs.	)	
METRO-GOLDWYN-MAYER/ UNITED ARTISTS ENTERTAINMENT COMPANY,	)	ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION
Defendant.	)	

This antitrust action was filed on November 9, 1982. On February 8, 1983 defendant moved to dismiss the complaint on several grounds. The motion was argued to the Court on April 11, 1983 and taken under submission. On April 22, 1983 the Court issued an order granting defendant's motion. Although the Court noted that there were several problems and potential problems with the complaint, the Court based the dismissal squarely upon the holding that the claims were barred by a release, signed by plaintiff, which had been included in the pleadings as an exhibit. However, plaintiff appeared to take the position that the release was signed under duress and that as a result, the release was unenforceable. The Court, therefore, dismissed the complaint without prejudice, granting plaintiff ten days leave in which to file an amended complaint alleging facts to support this allegation.

Plaintiff did not file an amended complaint within the time period granted. Therefore, on May 6, 1983, the Court dismissed the action with prejudice. On that same date, plaintiff filed a motion for reconsideration of the Court's April 22, 1983 order pursuant to F.R.Civ.P. 60(b).*

As indicated above, the complaint in this action was originally dismissed without prejudice to permit plaintiff to file an amended complaint alleging facts sufficient to support plaintiff's conclusory allegations that the release was signed under duress and, therefore, unenforceable. In the present motion plaintiff has abandoned his duress argument. Instead, plaintiff appears to argue that the release should not be enforced because his attorney, on whose advice plaintiff signed the release, acted either negligently or for improper purposes in giving this advice. At no point does plaintiff indicate why no amended complaint was filed as permitted by the court.

Initially, the Court notes that plaintiff has presented no competent evidence in support of his factual allegations. Plaintiff has presented some evidence showing that his lawyer was suspended from the practice of law more than six months after plaintiff signed the release in question. The suspension resulted from a felony conviction for receipt of stolen property. Apparently the felony was committed some time after plaintiff signed the release in question.

Plaintiff apparently contends that his lawyer advised him to sign the release because he knew that he was under investigation for this crime and that he wanted to "wind down" his practice. This argument is without any basis in logic in light of the fact that the release was signed before the crime was committed for which counsel was subsequently convicted and suspended.

Plaintiff, also contends that his lawyer was not competent to handle an antitrust case. There is no evidence before the court to support this allegation. However, even if it is true, plaintiff would not be entitled to the relief sought. Under certain circumstances courts have granted relief under §60(b) where counsel's negligence led to entry of judgment. The Court is aware of no authority, however, where relief has been granted under this Rule under facts even remotely similar to those alleged in this case. Plaintiff was free to select his attorney. Defendant negotiated with plaintiff's counsel in good faith and entered into a settlement of plaintiff's claims. Plaintiff may well have a claim for professional malpractice against his attorney if he can substantiate his allegations.

However, he is not entitled to relief from the dismissal of this action.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, copies of this order on counsel for the parties in this matter.

Dated: June 21, 1983

Malcolm M. Lucas
United States District Judge
(original signed)

FILED
APR 22 1983
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HENRY PARK for UNITED WORLD ENTERPRISES, INC. Plaintiff, vs. METRO-GOLDWYN-MAYER/ UNITED ARTISTS ENTERTAINMENT COMPANY, Defendant.	No. CV-82-5812 MML ORDER DISMISSING ACTION WITH PREJUDICE

On April 23, 1983 this Court dismissed the complaint in this action on the grounds that plaintiff's claims, as pleaded, were barred by a release which was attached to the complaint as an exhibit. In that order the Court granted plaintiff ten days leave to amend the complaint to allege facts sufficient to show that the release was void or voidable. No amended complaint has been filed in the period granted. The Court, therefore, dismisses this action with prejudice.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

Dated: May 6, 1983

Malcolm M. Lucas
United States District Judge
(original signed)

FILED
SEP 26 1984
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

APPENDIX "E"

A15

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HENRY PARK for UNITED WORLD ENTERPRISES, INC.	)	No. 83-6080
Plaintiff-Appellant,	)	
vs.	)	
METRO-GOLDWYN-MAYER/ UNITED ARTISTS ENTERTAINMENT COMPANY,	)	ORDER
Defendant-Appellee.	)	

Before: GOODWIN, SNEED, and ALARCON, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

(original appears not to be signed)

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 8306 Wilshire Boulevard, Beverly Hills, California 90211; that on December 26, 1984, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543
(Original and 40 copies)

Louis R. Miller
Michael F. Wright
Wyman, Bautzer, Rothman
Kuchel & Silbert
Two Century Plaza
2049 Century Park East
Los Angeles, California 90067
(3 copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 26, 1984, at Los Angeles, California.

Sheri R. Masser
(Original signed)

Office-Supreme Court, U.S.
FILED
FEB 1 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1046

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

HENRY PARK, FOR UNITED ENTERPRISES, INC.,
Petitioner,

vs.

METRO-GOLDWYN-MAYER/UNITED ARTISTS CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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No. 84-1046

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

HENRY PARK, FOR UNITED WORLD ENTERPRISES, INC.,
Petitioner,

VS.

METRO-GOLDWYN-MAYER/UNITED ARTISTS CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit erred in affirming dismissal with prejudice of petitioner's action under Fed.R.Civ.P. 12(b)(6) on the grounds that the action was barred by a release attached to the complaint as an exhibit.

STATEMENT OF THE CASE

On November 8, 1982, petitioner[1] filed this action CR 1[2] for alleged illegal tying of products by respondent United Artists Corporation ("UA"), purportedly in violation of §§ 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1,

[1]The complaint is unclear as to the identity of the plaintiff. Petitioner's pleadings contain references to petitioner both as an individual and a corporate entity. The action purports to be filed by Henry Park for United World Enterprises, Inc., but the injury alleged in the complaint appears to affect a South Korean entity called Dong Hyuep Corporation. For ease of reference, petitioner is referred to herein as "petitioner" or "plaintiff."

[2]"CR" refers to the District Court Clerk's record.

2. Because the complaint was dismissed under Fed.R.Civ.P. 12(b)(6), UA assumes for purposes of this petition that the allegations of the complaint are true. Petitioner alleged that in December, 1979, Dong Hyuep Corporation of South Korea ("Dong"), which was represented in its dealings with UA by Henry Park ("Park"), negotiated with UA for the rights to distribute the film "Rocky II" in South Korea. These negotiations culminated in the execution of a licensing agreement on January 10, 1980.

The complaint alleged that in addition to "Rocky II," UA "induced and persuaded" petitioner to buy the distribution rights to three other films. The basis of petitioner's illegal tying claim was that by "inducing and persuading" petitioner voluntarily to purchase the other three films, UA somehow committed illegal tying. The complaint alleged that petitioner paid UA $450,000 for "Rocky II" and $345,000 for the three other films combined.

Paragraph 16 of the licensing agreement, a copy of which plaintiff attached to the complaint as Exhibit 2, CR 33, provides that "all questions arising hereunder shall be interpreted and governed under and by the laws of the State of New York of the United States of America."

According to the complaint, the South Korean government censored one of the other three films licensed by Dong. Although UA replaced the censored film with another, the replacement film was itself censored, after which the parties allegedly modified the licensing agreement. Pursuant to the alleged modification, UA was to provide petitioner with two films in addition to "Rocky II" and to refund $95,000 of the purchase price petitioner allegedly had paid to UA. Petitioner alleged that UA refused to comply with the amendment and concluded negotiations by offering petitioner an "ultimatum." UA allegedly offered to refund $100,000 to petitioner and to provide no other

films in addition to "Rocky II" or simply to give petitioner no more films and no money.

Petitioner further alleged that in January, 1982, some two years after execution of the licensing agreement, it accepted the $100,000 offered by UA, as shown by a settlement agreement, which plaintiff attached to the complaint as exhibits, CR 63-67. Pursuant to release provisions contained in the settlement agreement, petitioner released UA and its successors from all claims related to or arising out of the licensing agreement and all related negotiations. Exhibits 13 and 15 to the complaint, CR 59-60, 62, among others, showed that throughout negotiation of the settlement agreement petitioner was represented by an attorney.

The release provisions of the settlement agreement are extremely broad, and specifically encompass all claims arising out of the January 10, 1980 licensing agreement. Paragraph 5 of the settlement agreement provides:

> "5. In consideration of the foregoing, Dong, [United] World [Enterprises, Inc.] and Park, and their subsidiaries and affiliates, on behalf of themselves and their respective agents, servants, employees, officers, directors, heirs, successors and assigns (jointly and severally, the 'Releasors'), each *unconditionally releases and discharges each party comprising United [Artists Corporation] and its subsidiaries and affiliates,* and all their respective agents, servants, employees, officers, directors, heirs, successors and assigns (jointly and severally, the 'Releasees'), *from any and all claims,* liabilities, causes of action at law or in equity, and costs whatsoever, *known and unknown, of every nature which Releasors have ever have had or now or in the future may have under the laws of the United States,* South Korea or any other jurisdiction, *arising out of or in connection with any transactions, events, acts or omissions with respect to the* [January

> 10, 1980 licensing] *Agreement, this agreement or any contracts, agreements, understandings or courses of dealing between Releasors on the one hand and Releasees on the other hand.*" (emphasis added)

A short-form release, attached as an exhibit to both the settlement agreement and the complaint, CR 63, provides for release by Dong, United World Enterprises, Inc. and Park of all claims, past, present or future:

> "... arising out of or in connection with that certain [licensing] agreement dated January 10, 1980 between Dong and [UA and all related entities] for the licensing to Dong of certain motion pictures for theatrical exhibition in South Korea or any other contracts, agreements, understandings, or courses of dealing between Dong, World and/or Park on the one hand and [UA and all related entities] on the other hand."

On February 8, 1983, UA moved to dismiss the complaint on the grounds, among others, that the action was barred by the release and that plaintiff had failed to allege any antitrust violation. In its opposition brief, plaintiff sought to contrive an interpretation of its allegations capable of avoiding the release. Among other things, plaintiff asserted a specious claim that the release was "part and parcel" of the alleged illegal tying.[3] Plaintiff also argued that the release was signed under "duress", as purportedly "shown" by allegations that UA had insisted that Henry Park per-

---

[3]Petitioner disingenuously asserts (petition ("pet.") at 2, 11) that the district court relied on *Carter v. Twentieth Century Film Corp.*, 127 F.Supp. 675 (W.D. Mo. 1955) in applying the release to bar petitioner's action. As shown, however, by petitioner's own brief in opposition to UA's motion, CR 100, the district court's memorandum order of April 22, 1983, CR 140, and the Ninth Circuit's opinion, petitioner itself relied on *Carter, supra*, as authority for its "part-and-parcel" argument. The district court and the Ninth Circuit held the case inapplicable.

sonally negotiate on behalf of Dong; that Mr. Park had flown several times to New York to negotiate with UA; and that petitioner had negotiated with UA in good faith. CR 102-106.

UA's motion was heard on April 11, 1983. In connection with that hearing, petitioner submitted to the court unsworn, unauthenticated documents in support of its "part-and-parcel" argument. Petitioner also offered unsworn, hearsay statements concerning misconduct by petitioner's former attorney, who had negotiated the settlement agreement for petitioner. Petitioner conceded, however, that such misconduct had occurred in "another matter," and was "irrelevant to this" case. CR 201-209.

By order of April 22, 1983, the district court granted UA's motion and dismissed the complaint with leave to amend within ten days. Because it appeared to the court "highly unlikely" that plaintiff would be able to "allege facts in good faith sufficient to support an allegation" that the release was void or voidable, the court did not address the "many additional defects" it found in the complaint. CR 142.[4]

In its dismissal order, the district court warned plaintiff that failure to amend the complaint within ten days would result in dismissal of the action with prejudice. CR 142. The lack of merit in petitioner's argument that it was denied

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[4]Even apart from the release, the complaint failed to allege an antitrust violation. Plaintiff merely alleged that it was "induced and persuaded" to license the allegedly "tied" films. Plaintiff thus failed to allege the essential element of coercion in its purported illegal tying claim. *Sobrato v. Prudential Insurance Co. of America*, 632 F.2d 786 (9th Cir. 1980). Plaintiff further failed to allege the essential elements of a claim for illegal monopolization. *California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 735 (9th Cir. 1979), or even an effect of the purported violation on the commerce of the United States, *National Bank of Canada v. Interbank Association*, 666 F.2d 6 (2d Cir. 1981).

equal protection of the laws (pet. at 12, 19-20), is evident from petitioner's voluntary refusal to amend the complaint, despite a clear invitation to do so. Instead of amending, on May 6, 1983, petitioner filed a motion under Fed.R.Civ.P. 60(b) for reconsideration of the court's April 22 dismissal order. CR 144. That same day the court dismissed the action with prejudice for petitioner's failure to amend. CR 160. Despite UA's arguments that plaintiff's Rule 60(b) motion was procedurally improper, the district court considered the motion on the merits. *See* CR 166, 184-87, 189-91.

The basis for petitioner's motion under Rule 60(b) was that petitioner's former attorney had been convicted of a crime (in connection with an unrelated matter) and disbarred. Petitioner later filed a supplemental memorandum, asserting that when plaintiff executed the release, it did not know its contents. Plaintiff also asserted that its purportedly weak bargaining position somehow constituted fraud in the inducement by UA. Significantly, plaintiff did not adduce any sworn evidence to support any of its loose factual assertions. By order entered June 24, 1983, the district court denied petitioner's motion for reconsideration.

On July 22, 1983, plaintiff noticed an appeal of the dismissal to the Ninth Circuit Court of Appeals. Plaintiff repeated to the Ninth Circuit virtually all of the arguments the district court had rejected, including the purported negligence of its former attorney. Plaintiff also argued that, despite its comprehensive language, the release was not "intended" to apply to antitrust claims.

In addition to responding to plaintiff's other arguments, UA argued to the Ninth Circuit that review of the judgment below was limited to the district court's denial of plaintiff's motion for reconsideration, from which alone plaintiff had timely appealed. The Ninth Circuit, in the interest of justice, rejected this argument and considered plaintiff's ap-

peal from the dismissal order on the merits. On June 14, 1984, after briefing and argument by both sides, the Ninth Circuit affirmed the district court judgment, holding that the release provisions of the settlement agreement barred the action. Plaintiff's petition for rehearing, filed June 22, 1984, was denied by order of September 26, 1984. The mandate of the Court of Appeals was entered on October 24, 1984. On December 26, 1984, plaintiff petitioned this Court for a writ of certiorari. UA received the petition on January 2, 1985.

SUMMARY OF ARGUMENT

The petition for certiorari should be denied because the Court of Appeals correctly held that the release barred petitioner's action.

ARGUMENT

1. Under a Federal Standard or New York Law, the Release Barred Petitioner's Action.

The essence of the judgment below is that the release provisions contained in the settlement agreement by their terms barred petitioner's action, and petitioner failed to present any grounds for voiding the release, either by amended complaint or affidavit. This interpretation of the release was clearly correct, under either a federal common-law standard or New York law.

The release provisions quoted above are clear and comprehensive. Pursuant to Paragraph 5 of the settlement agreement, petitioner released all claims, known or unknown, "arising out of or in connection with" the January 10, 1980 licensing agreement between the parties "or any other contracts, agreements, understandings or courses of dealing between [petitioner] on the one hand and [UA and all related entities] on the other." Paragraph 3 of the

settlement agreement, which refers to the short-form release attached to the agreement as Exhibit C as a "general release", further confirms the parties' intent to enter into a comprehensive release.

The language of the short-form release is itself very broad, encompassing all "contracts, agreements, understandings or courses of dealing" between the parties, specifically including all claims "arising out of or in connection with that certain agreement dated January 10, 1980 between Dong and [UA] for the licensing to Dong of certain motion pictures for theatrical exhibition in South Korea."

Plaintiff's antitrust claim was based entirely on purported illegal tying, which UA allegedly committed solely by means of the licensing agreement. According to the complaint, UA's antitrust violation consisted of "inducing and persuading" petitioner to include in the licensing agreement three other films in addition to "ROCKY II". That the release encompassed plaintiff's purported antitrust claim is thus clear on the face of the settlement agreement.

The release provisions enforced below are substantially identical to those held to bar an antitrust claim in *Ingram Corp. v. J. Ray McDermott & Co., Inc.*, 698 F.2d 1295, 1310-12 (5th Cir. 1983), on which the Ninth Circuit relied and which UA cited to the district court. In *Ingram*, the release by its terms applied to " 'all claims and demands whatsoever in law' against the Releasee." At the end of a "long and expansive" description of the claims released, similar to the description in the settlement agreement at issue here, the release in *Ingram* referred specifically to release of all claims arising out of three agreements between the parties, which "in essence amounted to the sale and conveyance of [plaintiff's] assets to [defendant]." As the Fifth Circuit reasoned in applying this general release to bar plaintiff's antitrust claim:

> "The releases thus have both general and specific characteristics, they are general in the same sense that every claim between the parties under the sun, no matter when it arose or whether it has yet arisen, is encompassed by the release. It is specific and thus definitely covers any and all claims which may have arisen or might arise from the sale of Ingram's assets. The sale of assets was Ingram's getting out of the business. Any claim pertaining to the sale of assets *must* be a claim 'arising out of, based upon or in any way relating to' . . . Ingram['s] leaving the business and is therefore encompassed by the releases.
>
> "Ingram's theory is that it was forced to sell its business because of the defendants' antitrust conspiracy. Since this is so, it *must* follow that any damages Ingram sustained because of the sale of its assets, which is the substance of its claim under the Clayton Act, are covered by the releases." (emphasis in original) *Id.* at 1310-11.

The district court and the Ninth Circuit in this case similarly concluded that the "general release" provisions attached to the complaint as exhibits, which specifically encompassed all claims arising out of the January 10, 1980 licensing agreement, barred the purported claims alleged in petitioner's complaint.

In many other cases, federal courts have held that such a general release bars antitrust claims. *See, e.g., Suckow Borax Consolidated, Inc. v. Borax Consolidated, Ltd.*, 185 F.2d 196 (9th Cir. 1950), *cert. den.*, 340 U.S. 943, 71 S.Ct. 506 (1951); *Redel's, Inc. v. General Electric Company*, 498 F.2d 95 (5th Cir. 1974) [holding release to bar antitrust claims existing as of date of execution]; *Richards Lumber & Supply Co. v. United States Gypsum Co.*, 545 F.2d 18 (7th Cir. 1976), *cert. den.*, 430 U.S. 915, 97 S.Ct.

1326 (1977); *Oskey Gasoline and Oil Co., Inc. v. Continental Oil Co.*, 534 F.2d 1281 (8th Cir. 1976); *Three Rivers Motors Co. v. Ford Motor Co.*, 522 F.2d 885 (3d Cir. 1975); *Schott Enterprises, Inc. v. Pepsico, Inc.*, 520 F.2d 1298 (6th Cir. 1975); *Virginia Impressions Products Co. v. SCM Corp.*, 448 F.2d 262 (4th Cir. 1971), *cert den.*, 405 U.S. 936, 92 S.Ct. 945 (1972); *Duffy Theatres, Inc. v. Griffith Consolidated Theatres, Inc.*, 208 F.2d 316 (10th Cir. 1953), *cert. den.*, 347 U.S. 935, 74 S.Ct. 629 (1954). The results in *Ingram* and in this case thus accord fully with federal precedent.

In relying on *Ingram, supra*, the Ninth Circuit seems to have applied a federal rule of decision in interpreting the release. The use of such a federal rule is consistent with the decisions of this Court, *Dice v. Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359, 361, 72 S.Ct. 312, 314 (1951), as well as prior Ninth Circuit decisions. *See Twentieth Century-Fox Film Corporation v. Winchester Drive-In Theaters*, 351 F.2d 925, 928 (9th Cir. 1965), *cert. den.*, 382 U.S. 1011, 82 S.Ct. 620 (1966).

Petitioner's main argument to this Court is that the Ninth Circuit somehow erred in failing to apply petitioner's version of New York law in interpreting the release. Some of the principal deficiencies in petitioner's argument are discussed in subsequent sections of this brief. Even if the courts below were required to apply New York law in interpreting the release, however, the result is the same.

Under New York law the intent of the parties is the "controlling issue" in construing the language of a release. Where such language is clear, "the intent of the parties must be discerned from the writing itself." *Powell v. Oman Construction Co.*, 267 N.Y.S. 2d 862, 25 A.D. 2d 566 (1966). "When the language of the release is clear, effect must be given to the intent of the parties as indicated by the lan-

guage employed." *In the Matter of Schaefer*, 18 N.Y. 2d 314, 274 N.Y.S. 2d 869 (1966). "[U]nless fraud, duress or illegality is established, the language of a voluntary release will be given its full effect." *Coral Gables Imported Motor Cars, Inc. v. Fiat Motors of North America, Inc.*, 673 F.2d 1234, 1238, *mod.* 680 F.2d 105 (11th Cir. 1982), *cert. den.*, 459 U.S. 1104, 103 S.Ct. 727 (1983).

New York courts have held that a release such as that at issue in this case may be applied to bar an action on preliminary motion. In *Teller Paving & Contracting Corp. v. City of New York*, 421 N.Y.S. 2d 364, 72 A.D. 2d 694, *reh.* 423 N.Y.S. 2d 171, 73 A.D. 2d 589 (1979), defendant unsuccessfully moved for summary judgment on the grounds that a release barred the action. The release encompassed "all claims which [plaintiff] may have . . . arising out of the aforesaid contract." Holding this language "clear and to the point," the court reversed the order denying defendant's motion for summary judgment.

In *Powell, supra*, the court held the language of a release providing for discharge of all claims "arising out of or in the course of [plaintiff's] employment" sufficiently clear to allow the court to infer the parties' intent from the language of the release. The court held that such a clearly worded release permitted the entry of summary judgment for defendant on plaintiff's claim for breach of plaintiff's employment contract. Here, the language of the release is at least as clear and comprehensive as those in *Teller* and *Powell*. The application of the release to bar petitioner's action on UA's motion to dismiss thus was entirely consistent with New York law.

2. Under a Federal Standard or New York Law, Petitioner's Purported Ignorance Was Insufficient to Void the Release.

Petitioner argues (pet. at 15) that the release was invalid because Park somehow did not know that he was releasing antitrust claims. As shown by Exhibits 13 and 15 to the complaint, CR 59-60, 62, petitioner was represented by an attorney throughout negotiation of the release. Petitioner therefore cannot argue that the release is void because of its purported ignorance of the terms or effect of the release. *See Link v. Wabash Railroad Company,* 370 U.S. 626, 633-34, 82 S.Ct. 1386, 1390, *reh. den.* 371 U.S. 873, 83 S.Ct. 115 (1962).

Moreover, Paragraph 5 of the settlement agreement specifically provides for the release of all claims, "known and unknown." Both Paragraph 5 and the short-form release attached to the settlement agreement as Exhibit C further provide for release of all claims "of every nature which Releasors ever have had or now or in the future may have."

The *Ingram* court rejected a claim of ignorance so closely similar to petitioner's argument here that the Fifth Circuit's reasoning may almost be applied verbatim:

> "[Petitioner] cannot escape the validity of the releases by merely asserting ignorance of its antitrust claim. Indeed, it may be unaware of many claims existing in its favor. When a release provides that 'any and all claims,' 'past, present, or future' are to be extinguished, a court is required to enforce its provisions both as to known and unknown claims. A contrary result would not contribute significantly to the public policy of encouraging the settlement of differences and compromise of disputes in which the execution and exchange of releases is the common and legally accepted means of consummation." *Id.* at 1312.

The release in this case is even stronger than that in *Ingram*, because it not only covers all possible claims, past, present or future, but specifically includes all claims "known and unknown." Similarly, the clear language of the release is all the courts below needed to consider under New York law. That petitioner may have intended to preserve certain claims is "irrelevant" where, as here, the release is clear on its face. *In the Matter of Schaefer, supra,* 18 N.Y. 2d 314, 274 N.Y.S. 2d 869.

3. Federal Policy Supports Settlement of Antitrust Claims.

Public policy supports the voluntary settlement of disputes, including those involving antitrust claims, without resort to litigation. *Ingram, supra,* 698 F.2d at 1316; *Schott Enterprises, supra,* 520 F.2d at 1300.

Such settlements are worthless unless the parties can rely on an adequately drafted and duly executed release. The release provisions at issue here could not be more comprehensively drafted nor could they more clearly show the parties' intent to effect release of all claims asserted in petitioner's complaint.

Enforcement of such settlement agreements by preliminary motion is especially appropriate in cases such as this.[5] Petitioner had both the opportunity to amend its complaint and a second opportunity on its motion for reconsideration to present sworn evidence of any facts showing that the release was invalid. Petitioner's failure to amend or adduce

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[5]Because the settlement agreement was attached to the complaint as an exhibit, it was properly considered on UA's motion to dismiss. Fed.R.Civ.P. 10(c); *Amfac Mortgage Corp. v. Arizona Mall of Tempe, Inc.*, 583 F.2d 426, 429-30 (9th Cir. 1978). Having pleaded the release, petitioner bore the burden of alleging facts sufficient to avoid its effects, or the action was barred. *Kincheloe v. Farmer*, 214 F.2d 604, 605 (7th Cir. 1954), *cert. den.*, 348 U.S. 920, 75 S.Ct. 306 (1955).

such sworn evidence proves that petitioner's arguments against application of the release were wholly without substance. Trial on the issues of the validity and enforceability of the release would have been a waste of judicial time and the resources of both parties. Application of the release on UA's motion to dismiss thus was entirely appropriate, both in terms of judicial economy and fairness to the parties.

4. The Ninth Circuit Was Not Required to Follow the Precedent of Federal Courts Sitting in New York.

Petitioner's principal argument to this Court is that the Ninth Circuit erred by failing to follow petitioner's peculiar version of New York law in interpreting the release. This argument rests on the initial premise that the choice-of-law provision contained in the January 10, 1980 licensing agreement compelled the courts below to interpret the release under New York law. This premise is incorrect.

The cases are unanimous in recognizing that the release of a federally created right is a matter of federal law. *Dice v. Akron, Canton & Youngstown Railroad Co., supra*, 342 U.S. at 359, 361, 72 S.Ct. at 314; *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 243-48, 63 S.Ct. 246, 249-52 (1942); *Ingram, supra*, 698 F.2d at 1316 n. 27. The courts are competent in such cases to choose the rule of decision that best effectuates the policy of the relevant federal statutory scheme. *Id.* Such a body of law may consist of "borrowed" state law or an independently derived federal rule. *See* Mishkin, "The Variousness of 'Federal Law'; Competence and Discretion in the Choice of National and State Rules of Decision," 105 *U.Pa.L.Rev.* 797, 799-803 (1957).

Indeed, even those courts that have applied state law in interpreting a release of an antitrust claim have done so on the rationale that although not mandatory, the choice of state law was appropriate because it effectuated federal antitrust policy. *See, e.g., Three Rivers Motors, supra*, 522

F.2d at 888-89. The courts below were therefore free to choose a rule of decision that best furthered federal antitrust policy.

Petitioner's argument rests on a second and equally erroneous premise. Petitioner appears correctly to assert that federal law "controls" the issue of the release. But, by petitioner's logic, the controlling authority is "therefore" the decisions of the federal district and appellate courts sitting in New York. Petitioner's logic is faulty. The courts below were free to exercise their discretion in choosing the rule of decision most consistent with federal policy. *See, e.g., D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation*, 315 U.S. 447, 469, 62 S.Ct. 676, 685 (Jackson, J., concurring), reh. den. 315 U.S. 830, 62 S.Ct. 910 (1942); *Gamewell Mfg., Inc. v. HVAC Supply, Inc.*, 715 F.2d 112 (4th Cir. 1983); 19 Wright, Miller & Cooper, *Federal Practice and Procedure*, § 4514 at 263-65 (1982). Contrary to petitioner's second premise, the courts below were not required to follow the decisions of the federal courts sitting in New York.

5. Petitioner Fails to Demonstrate Even That the Release Was Unenforceable Under Its Version of New York Law.

Finally, petitioner's argument that the Ninth Circuit erred in its choice of law only makes sense if petitioner can show that under its version of "New York law," the release was not enforceable on UA's motion to dismiss. Petitioner utterly fails to make any such showing. Petitioner relies on *Novak v. General Electric Corporation*, 282 F.Supp. 1010 (E.D. Pa. 1967), which was decided under New Jersey law and on that ground alone fails to support petitioner's argument. In *Novak*, moreover, the specific language of the release related only to plaintiff's claims arising out of defendant's sale of antifreeze to plaintiff.

The court in *Novak* merely held that under New Jersey law, it could not determine on defendant's motion for summary judgment that the release barred a claim arising out of defendant's sale of headlight lamps to plaintiff.

Similarly, in *Vines v. General Outdoor Advertising Co., Inc.*, 171 F.2d 487 (2d Cir. 1948), the specific release language encompassed only claims for unpaid salary or other compensation due under an employment agreement. Based on this language, the court held that the parties' intent with respect to release of plaintiff's antitrust claim could not be conclusively determined from the face of the release and reversed the district court's order granting summary judgment on plaintiff's antitrust claim.

Likewise, in *Walder v. Paramount Publix Corporation,* 132 F.Supp. 912 (S.D.N.Y. 1955), plaintiffs' antitrust claim was based on an alleged conspiracy among defendants to deprive plaintiffs' theater of first-run films and subsequent-run films on a competitive basis. An agreement between defendant and two of the plaintiffs provided for release of all claims, including those related to the " 'Tivoli Theatre and its equipment.' " The court denied defendants' motion for summary judgment on plaintiffs' antitrust claim, again on the grounds that the intent of the parties with respect to the antitrust claim was not clear on the face of the release.

In each of these cases, the specific release language suggested that the release might not encompass the claim defendants sought to bar by motion for summary judgment. In this case, by contrast, even the "specific" release language encompasses all claims "arising out of or in connection with any transactions, events, acts or omissions with respect to the [licensing] Agreement, this [settlement] agreement, or any other contracts, agreements, understandings or other courses of dealing between Releasors on

the one hand and Releasees on the other hand." There can be no question that this language encompasses the claims asserted in the complaint. *Novak, Vines,* and *Walder* are therefore inapplicable here.

Finally, petitioner relies on *Michael Rose Products, Inc. v. Loews, Inc.,* 141 F.Supp. 257 (S.D.N.Y. 1956) as "controlling" authority for the purported unenforceability of the release on UA's motion to dismiss. Space limitations preclude a full discussion of this case. Briefly, however, *Michael Rose* is inapplicable here for the following reasons:

1. In *Michael Rose,* plaintiff submitted a sworn affidavit, from which the court inferred the possibility of mutual mistake in the formation of the release agreement. Here, petitioner failed to provide the district court with any sworn evidence whatsoever of facts suggesting that the release was unenforceable.

2. The amount of money paid for the release in *Michael Rose* was identical to the amount of damages plaintiff claimed in a separate, pending action. The court relied in part on this evidence in finding a possibility that the release was intended to relate solely to plaintiff's claim in that action. No such circumstances are present here. *Michael Rose,* like the other cases on which petitioner relies, is simply inapposite.

CONCLUSION

For the reasons set forth above, UA respectfully urges this Court to deny the petition for certiorari.

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Respectfully submitted,

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